

NO. 43603-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID DANIELS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge
The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's convictions for promoting commercial sexual abuse of a minor and second degree promoting prostitution violate double jeopardy.

2. The trial court erred in entering an unlawful community custody term for promoting commercial sexual abuse of a minor.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of promoting commercial sexual abuse of a minor and second degree promoting prostitution during the same time periods. To survive a double jeopardy challenge under the "same evidence" test, each offense must require proof of an element not required in the other. While the first charge requires proof of an additional element, that the person promoted be a minor, the second contains no additional element. Do appellant's convictions for both crimes therefore violate double jeopardy?

2. Did the sentencing court err in entering an excessive community custody term?

B. STATEMENT OF THE CASE¹

The State charged appellant David Daniels with promoting commercial sexual abuse of a minor (PCSAM) and second degree promoting prostitution based on allegations that between January 1 and February 7, 2012, he was 15-year-old N.J.'s pimp. The State also charged Daniels with second degree robbery, unlawful imprisonment, and fourth degree assault of N.J., each alleged to have occurred on February 7, 2012. CP 1-8.

N.J. testified that Daniels promoted her into prostitution, acted as her pimp over a period of time, and collected the money she received for engaging in sexual activity with various clients. 3RP 14-40. N.J. initially told Daniels she was 19 but later admitted to him that she was 15. 3RP 14, 30. N.J. also testified after Daniels was no longer her pimp, she asked him for a ride home from a meeting with a client. 3RP 42-44, 58, 60-62. While in the car with N.J. and another woman, Daniels struck N.J., took her phone, and refused to let her out of the car when she requested. 3RP 40, 45-50. Believing the other woman had her phone, N.J. went to the

¹ This brief refers to the verbatim reports as follows: 1RP – 4/3 and 4/16/2012; 2RP – 4/23 and 4/24/2012; 3RP – 4/25/2012; 4RP – 4/26, 4/27, 4/30, and 5/1/2012; and 5RP – 6/15/2012.

woman's high school and reported the incident to the school resource officer. 2RP 28, 32-37; 3RP 50-51.

The jury acquitted Daniels of robbery and deadlocked on the unlawful imprisonment charge, resulting in a mistrial on that charge. The jury convicted Daniels of the remaining charges. CP 49-53; 4RP 52, 55-56.

The court calculated Daniels's offender score as seven on PCSAM and four on promoting prostitution and sentenced him to concurrent high-end standard range sentences. The court also ordered the misdemeanor assault sentence to run concurrent with the felony sentences. 5RP 16; CP 63-76. Daniels timely appeals. CP 204-18.

C. ARGUMENT

1. DANIELS'S CONVICTIONS FOR PCSAM AND SECOND DEGREE PROMOTING PROSTITUTION VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

a. Introduction to applicable law

The double jeopardy clauses of the state and federal constitutions bar multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995), State v. Lynch, 93 Wn. App. 716, 970 P.2d 769 (1999). But if a defendant's act supports charges under two statutes, this Court must

determine whether the Legislature intended to authorize multiple punishments for the crimes in question. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the Legislature intended for cumulative punishments to be imposed for the crimes, there is no double jeopardy violation. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005).

If the language of the criminal statutes at issue does not expressly disclose legislative intent as to multiple punishments, this Court considers whether multiple punishments are nonetheless permitted. Calle, 125 Wn.2d at 777. Under the "same evidence" or Blockburger test, convictions violate double jeopardy if the offenses are identical in fact and in law. State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). In other words, where the same act or transaction constitutes a violation of two statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not. Lynch, 93 Wn. App. at 723-24 (quoting Blockburger, 284 U.S. at 304). This Court engages in a commonsense, rather than mechanical, comparison of elements: Even if the elements facially differ, the court may nonetheless find they encompass the same violative conduct. State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

A double jeopardy challenge may be raised for the first time on appeal. State v. Durrett, 150 Wn. App. 402, 406, 208 P.3d 1174 (2009).

- b. The statutes do not expressly authorize multiple punishments for the same act.

In the first step of a double jeopardy analysis, this Court examines the language of the pertinent statutes to determine if the legislature authorizes multiple punishments for conduct that violates more than one statute. Hughes, 166 Wn.2d at 681; Freeman, 153 Wn.2d 771-73. Here, the statutes are silent on the issue. RCW 9.68A.001; RCW 9.68A.101; RCW 9A.88.080.

Because the Legislature expressed no intent to permit multiple punishments for the same act, this Court must engage in the next steps of double jeopardy analysis.

- c. Under the same evidence test, Daniels's multiple punishments violate double jeopardy.

This Court next examines whether the same act or transaction constitutes a violation of two statutory provisions. If so, this Court applies the “same evidence” test to determine legislative intent. Louis, 155 Wn.2d at 569. To determine whether there are two offenses or only one, this Court decides whether each provision requires proof of a fact the other does not. Lynch, 93 Wn. App. at 723-24.

Daniels was charged with promoting the commercial exploitation of a minor between January 1 and February 7, 2012. To convict Daniels of that charge, the State had to prove that between, January 1 and February 7, 2012, Daniels (1) knowingly advanced or profited from (2) a minor engaged in sexual conduct. RCW 9.68A.101(1); State v. Clark, __ Wn. App. ___, 283 P.3d 1116, 1124 (2012); see also CP 31 (to-convict instruction); CP 32 (unanimity instruction requiring jury to convict based on one particular act of PCSAM).

To convict Daniels of second degree promoting prostitution, the State had to prove that, between January 1 and February 7, 2012, Daniels knowingly advanced or profited from prostitution. RCW 9A.88.080; State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996); see also CP 45 (to-convict instruction); CP 46 (unanimity instruction requiring jury to convict based on one particular act of promoting prostitution). “Prostitution” means engagement or agreement to engage in sexual conduct with another person in return for a fee. RCW 9A.88.030(1); see also CP 24 (defining prostitution).

PCSAM requires that the person engaging in the prostitution be a minor. This element is not found in the second degree promoting prostitution statute. But for a conviction of second degree promoting prostitution, no additional element not found in PCSAM is required. All that is required is that the accused advance or profit from fee-based sexual

conduct. Lynch, 93 Wn. App. at 724. Because Daniels was charged with promoting N.J.'s prostitution during the same charging period and because *each* provision does not contain an element that the other does not, the conviction for the lesser crime should be reversed and dismissed. Id. at 727.

- d. This Court should reject any argument that the State elected different acts supporting two separate convictions.

Daniels anticipates the State may argue that the prosecutor elected different time periods to correspond to each charge. This Court should reject any argument that the convictions were, despite identical charging periods, necessarily based on separate acts.

First, the jury was provided unanimity instructions as to the two counts in question. CP 35, 32. But neither instruction informed the jury that the conduct forming the basis for the conviction had to be a separate and distinct act from the act under the other count. The jury could precisely follow the letter of the instructions and convict of both based on a single act.

Second, in closing, the State argued briefly that the promoting prostitution charge was supported by the events before Daniels learned N.J.'s true age. 4RP 15. But the court repeatedly, and correctly, instructed the jury that the parties' arguments were distinct from the court's instructions on the law. CP 21; 4RP 25, 27. Moreover, the Supreme Court rejected a similar

prosecutorial “election” as a basis to affirm in the face of an apparent double jeopardy violation. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008).

Kier is instructive here. Based on an alleged “carjacking,” the State charged Kier with first degree robbery of the passenger and the driver and second degree assault of the passenger. Id. at 808. The evidence at trial demonstrated that the passenger was a victim of the assault and the robbery; the instructions did not specify that the jury was to consider only the driver a victim of the robbery; and the jury was “properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel.” Id. at 813. The State failed to clearly identify the passenger as the victim of the assault until closing argument. Id. The Supreme Court concluded that because no election had been made outside of closing argument, the verdict was ambiguous and the rule of lenity required merger of the convictions. Id. The rule of lenity requires resolution of any ambiguity in the jury verdicts in the defendant's favor. Id. at 811-12; see also State v. Lindsay, __ Wn. App. __, __ P.3d __, 2012 WL 5423705 at *17 (Nov. 7, 2012) (so holding).

Consistent with Kier, this Court should find the prosecutor’s argument insufficient to relieve the ambiguity in the jury’s general verdicts. Id. at 814. With the instructions given, a reasonable juror could have based

the verdicts on identical acts occurring any time during the charging period. CP 31, 32, 45, 46. There is, for example, no minimum age requirement in a promoting prostitution charge.

The rule of lenity requires dismissal of the lesser count. See Kier, 164 Wn.2d at 814 (rule of lenity required the merger of second degree assault conviction into first degree robbery conviction). Accordingly, the lesser charge should be vacated and Daniels sentenced based on a lower offender score.

2. THE COURT IMPOSED AN EXCESSIVE
COMMUNITY CUSTODY TERM.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Under RCW 9.94A.701(2), a court is directed to sentence an offender to 18 months of community custody if he is convicted of a “violent offense that is not considered a serious violent offense.” Under chapter 9.94A.RCW, PCSAM is considered a “violent,” not a “serious violent” offense. RCW 9.94A.030(45) (list of “serious violent offenses”

does not include PCSAM); RCW 9.94A.030(54)(a)(i) (class A felonies are “violent offenses”). The court therefore erred in sentencing Daniels to 36 months rather than 18 months of community custody for PCSAM. CP 70.

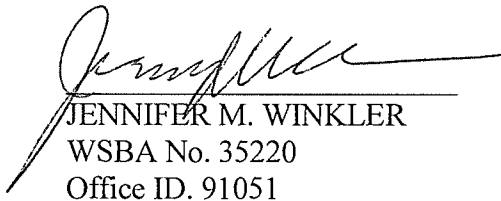
D. CONCLUSION

The convictions for PCSAM and second degree promoting prostitution violate double jeopardy. The lesser offense must be vacated and Daniels resentenced on the remaining charges based on corrected offender scores. Resentencing is also required because the court imposed an erroneous community custody term.

DATED this 14TH day of November, 2012.

Respectfully submitted,

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